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No. 82-357

In the Supreme Court of the United States

OCTOBER TERM, 1982

THE PEOPLE OF THE STATE OF MICHIGAN,
Petitioner,

-vs-

RAYMOND CLIFFORD AND EMMA JEAN CLIFFORD,
Respondents.

On Writ of Certiorari to the Court of Appeals of the State of Michigan

MOTION TO VACATE WRIT OF CERTIORARI AS IMPROVIDENTLY GRANTED ON AN ISSUE NEVER PRESENTED OR PRESERVED FOR APPEAL IN THE LOWER COURTS

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NOW COME the Respondents, RAYMOND CLIFFORD AND EMMA JEAN CLIFFORD, by and through counsel, K. Preston Oade, Jr., and respectfully move this Honorable Court to vacate the order granting certiorari in this cause; or for other relief; and in support thereof state as follows:

1. The writ of certiorari was granted in this cause per order dated January 24, 1983. The writ presents the following two issues for review:

> I. "May an arson squad investigator enter a burned dwelling to investigate the cause of a fire at the earliest time possible after the flames are extinguished without obtaining a search warrant?"

II. "Should the exclusionary rule be applied in a situation where the police conduct, even if viewed as improper, was taken in good faith and was not a 'but for' cause for the discovery of the items seized?"

2. As set forth herein, the record below clearly shows that the second issue presented for review (i.e. good faith) was never presented in the trial court; nor was it ever presented or argued in the Michigan Court of Appeals.

3. More specifically, the record of the proceedings in the trial court (see Joint Appendix) contains no reference whatsoever to the second issue which the Petitioners seek to have this court decide; nor does the record contain any mention whatsoever of any "good faith" issue that would excuse the warrantless search then being challenged in the trial court.

4. Similarly, the Petitioners' brief in the Michigan Court of Appeals is devoid of any argument or reference to any "good faith" exception to the exclusionary rule as being pertinent or at issue in the case. A copy of said brief is reproduced, infra, Appendix A.

5. That Petitioners' untimely interjection of an entirely new issue escaped the attention of your Respondents because the issue of good faith was disingenuously inserted into the language of an issue raised in the Michigan Court of Appeals, to wit:

(a) Petitioners, in the Michigan Court of Appeals, presented the following issue for the first time:

"The exclusionary rule should not be mechanically applied in situations where the police conduct even if viewed as improper was not a but for cause for the discovery of the items seized."

Court of Appeals brief, infra, p. A-5.

(b) The petition for certiorari interjected the good faith issue into the case for the first time as follows:

> "The exclusionary rule should not be mechanically applied in situations where the police conduct even if viewed as improper was *in good faith*, and not a but for cause for the discovery of the items seized." (emphasis added).
>
> Petition, p. 8.

6. That the insertion of the words "good faith" not only creates an entirely new issue, but also seeks to expand upon an issue that was never properly raised in the first place, to wit:

(a) The Michigan Court of Appeals implicitly declined to consider the "but for" argument because the State failed to raise the issue in the trial court. This procedural rule is consistently followed in Michigan. See *Township of Avon* v *Michigan State Boundary Commission*, 96 Mich App 736; 293 NW 2d 691, 699 (1980) (holding that the Court of Appeals will not review arguments raised for the first time on appeal).

(b) The Petitioners' failure to present a Federal question in conformance with State procedure constitutes an adequate and independent ground of decision barring review by this Court. *Henry* v *Mississippi*, 379 US 443, 447 (1965).

7. That in fact, the *only* issue raised by Petitioner in the trial court was the alleged presence of exigent circumstances justifying the warrantless search. (See Joint Appendix). This was the issue decided by the trial court and the Michigan Court of Appeals. (See Appendix B).

8. That the Petitioners' brief on the merits in this Court departs substantially from the issues and arguments presented in the lower court, to wit:

(a) In both the trial court and the Court of Appeals, Petitioner argued that exigent circumstances justified the warrantless search, citing *Michigan* v *Tyler*, 436 US 486 (1978).

(b) Petitioner now concede for the first time in their brief that "given this Court's holding in *Tyler* the Court of Appeals' ruling was inevitable." (Petitioner's brief, p. 35).

(c) The Petitioners in their brief now assert for the first time that this Court should overrule an entire line of cases, including *Michigan* v *Tyler*; and present sweeping arguments in support thereof that are now being raised for the first time.

9. That Petitioners' brief on the merits is also contrary to the rules of this Court because it raises additional questions and changes the substance of the questions presented in the petition for writ of certiorari. See Rule 34.1(a).

10. That it is settled law that this Court will not decide Federal Constitutional issues raised in this Court for the first time on review of State court decisions. *Cardinale* v *Louisiana*, 394 US 437, 438 (1969). This Court should decline to do so here. Because new issues are now being raised for the first time, the record is insufficient for this Court to render an informed decision on the sweeping Constitutional issues presented by Petitioner. Finally, the Petitioners' procedural default in the Michigan Courts constitutes an adequate and independent ground of decision barring review in this Court. *Michigan* v *Tyler*, 436 US 499, 512, n. 7 (1978).

RELIEF REQUESTED

WHEREFORE, Respondents request entry of an order vacating the grant of certiorari on the grounds that the writ was improvidently granted; or, in the alternative, entry of an appropriate order striking issue number II from the Petitioner's brief on the merits; with costs to Respondents.

Respectfully submitted,

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Dated: April 5, 1983

APPENDIX A

STATE OF MICHIGAN
IN THE COURT OF APPEALS

THE PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

RAYMOND CLIFFORD and
EMMA JEAN CLIFFORD,
Defendant-Appellants.

Court of Appeals
No. 58278
Detroit Recorder's
Court No.
80-07406

APPELLEE'S BRIEF ON APPEAL
**ORAL ARGUMENT REQUESTED

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COUNTERSTATEMENT OF QUESTION INVOLVED

WAS THE ARSON SQUAD'S DELAYED INVESTIGATION PERMISSIBLE?

Defendant-Appellants say: "No."

Plaintiff-Appellee says: "Yes."

COUNTERSTATEMENT OF FACTS

Plaintiff-Appellee accepts Defendant-Appellants' Statement of Facts.

ARGUMENT

(Defendants' I and II)

THE ARSON SQUAD INVESTIGATION WHICH WAS DELAYED UNTIL AFTER THE WATER WAS PUMPED OUT OF THE HOUSE WAS PERMISSIBLE.

A. DELAYED INVESTIGATION IS PERMISSIBLE WHERE EXIGENT CIRCUMSTANCES FOR THE DELAY EXIST.

In *Michigan* v *Tyler*, 436 US 499, 56 L Ed 2d 486, 98 S Ct 1942 (1978), the United States Supreme Court held:

> *On the facts of this case, we do not believe that a warrant was necessary for the early morning re-entries* on January 22. As the fire was being extinguished, Chief See and his assistants *began their investigation, but visibility was severely hindered by darkness, steam, and smoke.* Thus they departed at 4 a.m. and *returned*

> *shortly after daylight to continue their investigation. Little purpose would have been served by their remaining in the building, except to remove any doubt about the legality of the warrantless search and seizure later that same morning.* Under these circumstances, we find that the morning entries were *no more than an actual continuation of the first, and the lack of a warrant thus did not invalidate the resulting seizure of evidence.* (Emphasis added).

This holding is applicable to the instant case. During the initial entry by firefighters it appeared to them the fire had been deliberately set (T. 9).* However, the firefighters are not trained investigators. Further, the condition of the premises made investigation at that time impossible. Indeed, when the arson investigators arrived six hours later, it was still necessary for them to wait before investigating as there was still one foot of water in the basement which was being pumped out (it should be noted that the flammable liquid and timing mechanism were found in the basement which had been flooded).

In *Tyler*, the investigation was delayed for five hours because of darkness, smoke and steam. In this case it could not have occurred until six hours after the fire was extinguished because of the water in the basement. As in *Tyler* then, no warrant was required for the entry in this case.

B. THE EXCLUSIONARY RULE SHOULD NOT BE MECHANICALLY APPLIED IN SITUATIONS WHERE THE POLICE CONDUCT EVEN IF VIEWED AS IMPROPER WAS NOT A BUT FOR CAUSE FOR THE DISCOVERY OF THE ITEMS SEIZED.

---

* Numerals in parentheses refer to pages of the trial transcript.

Even if this Court does not view the arrival of the arson investigators as a re-entry, it is clear that had they arrived on the scene when the fire was extinguished, observed the water, left and returned after it was pumped out, the entry would have been perfectly proper under *Tyler*. That they did not arrive when the fire was extinguished should not make a difference.

In *United States* v *Jarvis*, 560 F2d 494, 498-499 (CA 2, 1977), Jarvis was arrested in his home after a forcible warrantless entry by FBI agents. Incident to his incarceration he was photographed and his palm print taken, and the photo and palm print were used in the trial. Though expressing serious doubt as to the legality of the arrest because of the forcible warrantless entry, the court held:

> We nevertheless decline to suppress the photo and palmprint obtained as a result of the arrest. Had the agents waited outside of Jarvis' home, they could have arrested him, when he emerged, based solely on probable cause. They would then have obtained the palmprints and a photo, the evidence which Jarvis seeks to suppress. The illegal arrest thus was not a "but for" cause for the introduction of the evidence appellant seeks to suppress. . .
>
> This is not a case where the government "exploits" an unlawful arrest by obtaining a conviction *on the basis of the very evidence not shown to have been otherwise procurable, which it had hoped to obtain by its unconstitutional act.* (Emphasis added).

Since it cannot be said that the evidence would not have been discovered but for the allegedly improper entry, the evidence should not be suppressed.

RELIEF

WHEREFORE, Appellee requests the ruling of the lower court be affirmed.

Respectfully submitted,

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Dated: November 6, 1981

APPENDIX B
STATE OF MICHIGAN
COURT OF APPEALS

March 30, 1982

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

No. 58278

v

RAYMOND CLIFFORD and
EMMA JEAN CLIFFORD,
Defendant-Appellant.

Before: Cynar, P.J., M.J. Kelly and D.C. Riley, JJ. PER CURIAM

Defendants are charged with wilfully and maliciously burning a dwelling house and the contents thereof, contrary to MCL 750.72; MSA 28.267. On April 14, 1981, the trial court denied defendant's motion to suppress certain evidence which defendants argue was seized incident to an unlawful warrantless search of their home by arson investigators. Defendants were granted interlocutory leave to appeal from this order pursuant to GCR 1963, 806.2.

On October 18, 1980, at about 5:42 a.m. a fire broke out at defendants' home, while the defendants were out of town. Within minutes firefighters arrived on the scene. At 7:04 a.m. the fire was extinguished and the fire units departed. Later that same day, at about 1:00 p.m., Lt. John Beyer, an arson investigator for the Detroit Fire

Department, and his partner arrived for the first time at defendants' home.

At the evidentiary hearing, Lt. Beyer testified that he and his partner did not enter defendants' house until 1:30 p.m. because they waited while men pumped water out of the basement. He admitted that these men were not employees of the fire department but were assumedly agents of defendants' insurance company. According to Lt. Beyer, he entered defendants' home based upon the arson squad's policy which permits an investigator to enter a burned dwelling without a warrant if the owner is not present and the dwelling is deemed open to trespass. As a result of their search, the investigators seized three empty cans of fuel, an electric crock pot and a timer with a cord attached. All three items were discovered in the basement of defendants' home. Over defendants' objection, this evidence was introduced at the preliminary examination. The trial court denied defendants' motion to suppress the evidence on the grounds that exigent circumstances justified the warrantless entry.

Defendants raise two issues by this appeal. First, defendants contend that the arson squad's policy of permitting warrantless searches of burned dwellings where the owner is not at home and the dwelling is deemed open to trespass is unconstitutional. Defendants rely on **People v Tyler**, 399 Mich 564; 250 NW2d 467 (1977), **aff'd Michigan v Tyler**, 436 US 499; 98 S Ct 1942; 56 L Ed 2d 486 (1978), which held that, based on the Fourth Amendment:

"If there has been a fire, the blaze extinguished and the firefighters have left the premises, a warrant is required

to re-enter and search the premises, unless there is consent or the premises have been abandoned." **Id.**, 583.

This case was appealed to the United States Supreme Court, which affirmed the state court's decision, but expanded the time period as to when the need for a warrant arises:

"Although the Michigan Supreme Court appears to have accepted this principle, its opinion may be read as holding that the exigency justifying a warrantless entry to fight a fire ends, and the need to get a warrant begins, with the dousing of the last flame. 399 Mich. at 579, 250 NW2d, at 475. We think this view of the firefighting function is unrealistically narrow, however. Fire officials are charged not only with extinguishing fires, but with finding their causes. Prompt determination of the fire's origin may be necessary to prevent its recurrence, as through the detection of continuing dangers such as faulty wiring or a defective furnace. Immediate investigation may also be necessary to preserve evidence from intentional or accidental destruction. An , of course, the sooner the officials complete their duties, the less will be their subsequent interference with the privacy and the recovery efforts of the victims. For these reasons, officials need no warrant to remain in a building for a reasonable time to investigate the cause of a blaze after it has been extinguished. And if the warrantless entry to put out the fire and determine its cause is constitutional, the warrantless seizure of evidence while inspecting the premises for these purposes also is constitutional." **Michigan v Tyler**, 436 US 499, 509-510; 98 S Ct 1943; 56 L Ed 2d 486 (1978).

We find that the arson squad's policy contradicts the **Michigan v Tyler** holding in that it sanctions warrantless

searches by investigators without first determining that the facts in a given case fall within an exception to the warrant requirement, such as abandonment or exigent circumstances. A dwelling open to trespass does not, in itself, amount to an abandonment, nor does it necessarily constitute exigent circumstances. The requirements of law control over departmental policies. We therefore find that the arson squad's policy as it now stands is unconstitutional.

Defendants also argue that the trial court erred in denying their motion to suppress certain evidence seized as a result of the unlawful warrantless search by the arson investigators. Defendants again rely on **Michigan v Tyler.** In that case, a fire broke out shortly after midnight. The fire investigators arrived on the scene and began to search the premises while the firefighters were combating the blaze. They had no warrant nor consent for this initial search. By 4 a.m. the fire was extinguished. The investigators left the scene soon after because their visibility was hindered by the darkness, steam and smoke. They returned four hours later and again searched the premises without a warrant. The United States Supreme Court upheld the initial search, stating that:

". . . officials need no warrant **to remain** in a building for a reasonable time to investigate the cause of a blaze after it has been extinguished." (Emphasis added.) **Id.,** 510.

As to subsequent re-entry four hours later, the United States Supreme Court found this warrantless search to be constitutional based on the fact that the investigators began their search while the fire was being extinguished and noted:

"Under these circumstances, we find that the morning entries were no more than an actual continuation of the first, and the lack of a warrant thus did not invalidate the resulting seizure of evidence." **Id.**, 511.

However, the Court further held that several subsequent re-entries which were "clearly detached from the initial exigency and warrantless entry" were unconstitutional. **Id.**

In the instant case, the arson investigators did not arrive while the fire was being put out. In fact, they did not arrive until six hours after the fire was extinguished. They did not enter the premises for the purpose of ensuring that the blaze would not rekindle or to prevent the iminent destruction of evidence. See People v Farnsley, 94 Mich App 34; 287 NW2d 361 (1979), People v Foster, 103 Mich App 311; 302 NW2d 862 (1981). Contrary to plaintiff's contention, the water in the basement did not create exigent circumstances. It merely increased the time by a half-hour in which the investigators could have obtained an administrative search warrant. The search in the instant case was similar to the subsequent searches which were found to be impermissible in **Michigan v Tyler.** Thus, we find that absent a clear showing of exigent circumstances, the warrantless search by arson investigators was unconstitutional under **Michigan v Tyler.** The trial court erred in denying defendants' motion to suppress the evidence which was a product of this search.

Reversed.

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

No. 58278

v

RAYMOND CLIFFORD and
EMMA JEAN CLIFFORD,
Defendant-Appellant.

Before: Cynar, P.J., M.J. Kelly and D.C. Riley, JJ., M.J. Kelley, J. (Concurring).

This is yet another example of the ludicrous extent to which the higher courts have taken us with regard to the constitutional protections extrapolated from the Fourth Amendment Search and Seizure provisions. What expectation of privacy could the owners, who were away on a camping trip, have of a burned and gutted building which was accumulating water and which was open to trespassers?

I agree with the majority that the circumstances were not "exigent". I disagree that the arson squad policy was unconstitutional, but my disagreement is futile in the face of the holdings in **People v Tyler**, 399 Mich 564; 250 NW2d 467 (1977) and **Michigan v Tyler**, 436 US 499; 98 S Ct 1942; 56 L Ed 2d 486 (1978). I would encourage the plaintiff to take this issue further in the appellate process. It seems to me eminently reasonable that an arson squad investigator be permitted to enter a burned dwelling without a warrant if the owner or someone legitimately in a position to object is not present and the dwelling is open to trespass.